IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARON C. WHEELER, et. al.,	:	
Plaintiffs	:	CIVIL ACTION
v.	:	
	:	NO. 03-4826
JEFFREY BEARD, et. al.,	:	
Defendants	:	
	:	
	:	

Memorandum and Order

Yohn, J. August _____, 2005

Pro se plaintiffs Aaron C. Wheeler, Theodore B. Savage, James S. Pavlichko, and Derrick D. Fontroy are prisoners currently incarcerated at State Correctional Institution Graterford ("SCIG") in Pennsylvania. Defendants are the Pennsylvania Department of Corrections ("DOC"), SCIG, the SCIG Medical Department, the SCIG Mental Health Department, the SCIG "CERT" Team, and DOC employees Arroyo, Beard, Burke, Canino, Clayton, Conrad, Cook, Croll, DiGuglielmo, Feilds, Geist, Grassmeyer, Hardnett, Hatcher, Horn, Hosband, James, Jones, Klem, Knauer, Kovalchik, Kyler, Matello, Martin, Maue, McVey, Mooney, Moyer, Murray, O'Hara, Rosso, Smith, Spencer, Stachelek, Ulisney, Unvarsky, Vaughn, and Wolfe (collectively "DOC Defendants"). Also named as defendants are various vendors with which the DOC has or had contracts to sell products and services to inmates incarcerated in Pennsylvania prisons (collectively "Vendor Defendants").

Presently before the court are separately filed motions by three subsets of the DOC Defendants to dismiss plaintiffs' Second Amended Complaint in its entirety pursuant to Federal

Rule of Civil Procedure 12(b)(6). For the reasons described herein, the motions will be granted in part and denied in part.

Background and Procedural History

On August 8, 2003, plaintiffs filed their initial *pro se* complaint in this matter. The pleading was twice amended before being filed in its present form on September 8, 2004. In addition to federal antitrust claims and common law fraud and misrepresentation claims, plaintiffs raise a host of constitutional claims pursuant to 42 U.S.C. § 1983. More than 70 pages of the sprawling 120-page complaint are comprised of allegations that various prison officials, acting individually and in concert, retaliated against plaintiffs in response to plaintiffs' filing administrative grievances within the prison system and a federal lawsuit in May 2002 against defendants Vaughn, Hatcher, Beard, and Ulisny. *See Fontroy v. Schweicker*, No. 02-2949 (E.D. Pa.). The remainder of the complaint challenges the constitutionality of plaintiffs' conditions of confinement and includes claims under § 1983 relating to the DOC's grievance and appeals process, its mail policy, its provision of medical services to inmates, its management of funds, and its maintenance of facilities.

Several defendants in the case filed motions to dismiss prior to the submission of the Second Amended Complaint. These motions were renewed, and, in some cases modified or supplemented, following submission of the Second Amended Complaint. To date in the case, 12(b)(6) motions have been filed by the DOC Defendants and by Vendor Defendants Access Catalog Co. ("Access"), Jack L. Marcus, L.L.C. ("JLM"), Verizon Pennsylvania, Inc. ("Verizon"), and Mike's Better Shoes ("MBS"). The motions filed by Access, JLM, Verizon, and MBS are the subject of a separate disposition, as are the portions of the motions filed by the DOC

Defendants that argue for dismissal of plaintiffs' antitrust and common law fraud claims. This opinion addresses the DOC Defendants' motions to dismiss the remaining claims in the Second Amended Complaint.

Discussion

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of a complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In evaluating a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989) (citing *Wisniewski v. Johns-Manville Corporation*, 759 F.2d 271, 273 (3d Cir. 1985)). The court may dismiss a complaint, "only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swin Resource Systems, Inc. v. Lycoming County, Pennsylvania, acting through the Lycoming Company Solid Waste Department*, 883 F.2d 245, 247 (3d Cir. 1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

"A *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (quoting from *Haines v. Kerner*, 404 U.S. 519 (1972)).

I. First Amendment Claims

A. Retaliation

Plaintiffs allege that the DOC defendants individually and, in some instances, concertedly engaged in a pattern of illegal conduct to retaliate against them for exercising their constitutionally protected right to petition the government for redress of grievances. The Second Amended Complaint catalogs numerous allegedly retaliatory actions taken against each of the four plaintiffs. *See* Second Amended Complaint ("SAC") at 12-78.

To state an actionable claim for retaliation, a prisoner-plaintiff must prove that (1) the conduct which led to the alleged retaliation was constitutionally protected; (2) he suffered some adverse action that was sufficient to deter a person of ordinary firmness from exercising his constitutional rights; and (3) the constitutionally protected conduct was a substantial or motivating factor in the decision to take adverse action. *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001).

The Commonwealth argues that plaintiffs' § 1983 retaliation claims should be dismissed because plaintiffs' allegations of causation are wholly conclusory in virtually every instance. To wit, the Commonwealth maintains that plaintiffs allege neither close temporal proximity between the filing of their suit and the alleged retaliatory actions, nor any improper motive on the part of DOC defendants (excepting Kovalchik and Cook). Furthermore, the Commonwealth contends, much of the conduct complained of is neither sufficiently adverse to support a retaliation claim, nor sufficiently serious to deter a person of ordinary firmness from exercising his or her constitutional rights.

Plaintiffs in this case identify their *pro se* prosecution of a federal lawsuit challenging the constitutionality of a prison mail regulation as the basis for the retaliation they have allegedly suffered at the hands of the DOC defendants. Plaintiffs also assert that they have suffered

retaliation for filing grievances within the prison system. Because plaintiffs as state prisoners have a right under the First and Fourteenth Amendments to petition the government for redress of grievances and to enjoy free access to the courts, *Milhouse v. Carlson*, 652 F.2d 371, 373-374 (3d Cir. 1981), their Second Amended Complaint meets the first element of a cause of action for retaliation.

To establish the second element, a prisoner-plaintiff need not allege that the adverse action on which his claim is based involved the violation of a constitutional right. "Government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for the protection of a constitutional right."[1] *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003). Adverse government actions that have been deemed sufficient to support a retaliation claim include filing false misconduct reports against a prisoner, *see Smith v. Mensinger*, 293 F.3d 641 (3d Cir. 2002); detaining a prisoner in administrative segregation, *see Allah v. Seiverling*, 229 F.3d 220 (3d Cir. 2000); denying a prisoner parole, *see Rauser*; transferring a prisoner to a distant prison, *see id.*; reducing a prisoner's wages, *see id.*; placing a prisoner lower on a promotion ranking list, *see Suppan v. Dadonna*, 203 F.3d 228 (3d Cir. 2000); and transferring a prisoner from a single to a double cell, *see Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995) (cited by the Third Circuit with approval in *Allah*).

Plaintiffs have alleged adverse actions sufficient to establish the second element of the

[1]I will go on to evaluate the independent constitutional merits of many of the claims that plaintiffs raise in the context of their case for retaliation. These claims will be addressed on their own merits in addition to being discussed in the context of retaliation, because, construing the complaint liberally, plaintiffs appear in many instances to be proceeding under both theories.

prima facie retaliation case. Wheeler alleges that his incoming personal mail was intercepted, SAC at 16, and his outgoing legal mail was delayed, *id.* at 17-18; that he was denied medical treatment, *id.* at 14-15; that his grievances were either not processed or not processed in a timely fashion, *id.* at 14; that his cell was ransacked, *id.* at 15; and that he was denied prison-issued necessary supplies (i.e., underwear), *id.* at 19. Savage alleges that he was placed in the prison's Restricted Housing Unit ("RHU") on the basis of a false charge, *id.* at 27; that he was denied single-cell housing status, *id.* at 33-35; that he lost his job, *id.* at 35-36; that his cell was ransacked, *id.* at 26, 37; that contraband was planted in his cell to serve as the basis for a bogus misconduct report, *id.* at 37-41; that his custody level was wrongfully increased, leading to the loss of privileges, *id.* at 54; and that his grievances were repeatedly rejected for spurious reasons, *id.* at 55.

Pavlichko alleges that his legal materials were seized, *id.* at 68; that he was transferred to another prison despite having withdrawn a previously submitted transfer request, *id.* at 69-70; that he was transferred within SCIG to a housing unit apart from his co-plaintiffs, *id.* at 71-72; that he was assigned to the RHU for not having permission to be in an area that he was actually authorized to visit, *id.* at 73-75; and that he lost his job, *id.* at 76. Fontroy alleges that his legal mail and other legal materials were destroyed or confiscated, *id.* at 78-81; that false disciplinary charges were filed against him, resulting in his segregation in the RHU, *id.* at 79-80; that his outside purchase forms were arbitrarily denied, *id.* at 82; and that catalog merchandise he ordered was returned to vendors undelivered, *id.*

While plaintiffs may not ultimately be able to prove that the adverse actions alleged in their complaint actually occurred, or, if such actions did occur, that they would have deterred a

person of ordinary firmness from exercising his constitutional rights, the court must accept the allegations as true for purposes of this motion and is guided by existing Third Circuit case law establishing what is minimally required to satisfy the element of adverse action in a prima facie retaliation case.[2]

The third element of the prima facie retaliation case is causation. For purposes of establishing causation, evidence of "suggestive temporal proximity" is relevant. *Rauser*, 241 F. 3d at 334. The Third Circuit has held that the mere mention of the word "retaliation" in a prisoner's *pro se* complaint "sufficiently implie[d] a causal link" between the prisoner's complaints and the misconduct charges filed against him to survive *sua sponte*dismissal by the district court. *Mitchell*, 318 F.3d at 530.

Plaintiffs expressly allege that the adverse actions taken against them were taken because they filed a federal lawsuit and because they frequently file administrative grievances. Savage alleges that Matello, Kovalchik, Jones, and Cook made direct and unambiguous statements linking their adverse actions to his involvement in litigation. Wheeler is quite systematic in his allegations of temporal proximity, arguing in plaintiffs' reply brief that such allegations are sufficient to establish circumstantial evidence of causation. It is true that not all of the plaintiffs allege equally relevant or compelling facts, but at this stage, they have alleged enough to establish the element of causation.

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[2]In its brief, the Commonwealth cites cases from the Second, Fourth, Sixth, and Tenth Circuits, but none from the Third Circuit, to stand for the proposition that *de minimis* adverse actions are insufficient to support a retaliation claim. While it is true that some of the actions plaintiffs allege are *de minimis* as a matter of law, insofar as they would not conceivably deter a prisoner of ordinary firmness from exercising his constitutional rights (*e.g.*, Wheeler's allegation that he was denied new underwear), not all of plaintiffs' allegations are so clearly trivial.

Given that plaintiffs have satisfied the elements of a prima facie case for retaliation, the Commonwealth's motion to dismiss the retaliation claims in the Second Amended Complaint must be denied. However, prison officials may still prevail on the issue of retaliation if they can prove by a preponderance of the evidence that they would have taken the same actions, absent the protected conduct, for reasons reasonably related to a legitimate penological interest or interests. *Carter v. Dragovich*, 292 F.3d 152, 159 (3d Cir. 2002).

B. Regulation Banning Nude Photographs and Obscene Sexually Explicit Periodicals

In the section of the Second Amended Complaint labeled "Personal and Nude Photographs Claim," plaintiffs mount a First Amendment challenge to the portions of the DOC inmate mail policy that bar inmates from possessing nude photographs[3] and from receiving publications that contain obscene sexually explicit material.[4] *See* DC-ADM 803 Part VI. A. 11 (nude photographs); Part VI. F. 2. d. (sexually explicit publications). Plaintiffs allege that two nude photographs of Savage's wife, four photographs of Wheeler's wife dressed in lingerie, and copies of *Fox* and *Gallery* magazine were intercepted by SCIG officials pursuant to the challenged policy, which, plaintiffs argue, is unconstitutional because it has no "just or valid

[3]DC-ADM 803 defines "nude" to mean "showing the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or showing the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple." It defines "photograph" to mean "an image of a person, place, or object made using a camera or device, which exposes a photosensitive surface to light." The policy excludes from the definition of "photograph" "pictures in a magazine or other publication of general circulation." *See* DC-ADM 803 at IV. J.

[4]DC-ADM 803 defines "obscene" according to eight criteria and prohibits materials that depict non-consensual sex, violent or assaultive sex, sex involving domination and humiliation, sex involving minors, sex involving actual penetration, bodily excretory functions, bestiality, bondage, and sadomasochism. *See* DC-ADM 803 at VI. F. 3. b.

penological interest or justification." With respect to the ban on "obscene" sexually explicit publications, plaintiffs contend that the DOC may not set standards for obscenity that are stricter than those that apply to publications sold at newsstands throughout the Commonwealth.

The standard for evaluating claims that prison regulations violate prisoners' constitutional rights was set by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987), a case in which the Court recognized the need to balance the principle that the "federal courts must take cognizance of the valid constitutional claims of prison inmates" with the competing principle that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.* at 84 (citing *Procunier v. Martinez*, 416 U.S. 396, 413-414 (1974)). The Court held in *Turner* that prison regulations are valid if they are "reasonably related to legitimate penological interests." *Id.* at 87.

To determine whether a given regulation is reasonably related to legitimate penological interests, federal courts, following *Turner*, must consider the following four factors: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether there are "alternative means of exercising the right that remain open to prison inmates"; (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether there is "an absence of ready alternatives" by means of which the asserted goal could be accomplished. *Turner*, 482 U.S. at 89-90.

The Third Circuit has held that, when deciding a motion to dismiss a prisoner's First Amendment challenge to a prison regulation, a district court may not, as a rule, rely solely on common sense to determine whether "the requisite rational connection between a prison

restriction and a legitimate penological interest can be found." *Ramirez v. Pugh*, 379 F.3d 122, 127 (3d Cir. 2004) (testing the constitutionality of a law prohibiting the use of federally appropriated prison funds for the distribution of sexually explicit materials in prisons). An element-by-element *Turner* analysis is required. *Wolf v. Ashcroft*, 297 F.3d 305, 307 (3d Cir. 2002). In *Wolf*, the Third Circuit reversed a district court's dismissal of a prisoner's challenge to a restriction on the screening of R- and NC-17-rated movies in federal prisons because the district court's analysis of the *Turner* factors was insufficient. *Wolf*, 297 F.3d at 307. The panel concluded that the case had been improperly dismissed and directed the district court on remand to "describe the interest served, consider whether the connection between the policy and the interest is obvious or attenuated–and, thus, to what extent some foundation or evidentiary showing is necessary–and, in light of this determination, evaluate what the government has offered." *Id.*

Here, the Commonwealth's brief contains no statement concerning the penological interests served by the two provisions in DC-ADM 803 that plaintiffs challenge. While judgment on the pleadings may be appropriate if the relationship between the challenged regulation and the interest assertedly served is an obvious one, the party defending the regulation must first identify the interests served and demonstrate that the regulation's drafters could rationally have seen a connection between the regulation and those interests. *Wolf*, 297 F.3d at 308.

It is true, as the government points out, that a similar regulation restricting inmate access to sexually explicit materials has been upheld in this circuit. *See Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999) (upholding a restriction on pornographic materials in a facility for sex offenders). Other circuits have also upheld similar restrictions. *See Giano v. Senkowski*, 54 F.3d

1050 (2d Cir. 1995) (upholding a policy banning nude or semi-nude photographs of inmates' spouses and girlfriends); *Trapnell v. Riggsby*, 622 F.2d 290 (7th Cir. 1980) (declining to overturn a regulation banning nude and pornographic photographs).[5] Nevertheless, the *Turner* analysis is required before a judgment can be made about the constitutionality of the provisions challenged in this suit.

While it is plausible that the challenged provisions in DC-ADM 803 will ultimately be shown to satisfy the requirements of *Turner*, the Commonwealth is not thereby relieved of its obligation, when moving for dismissal or summary judgment, to identify the interest served by the challenged provisions and to show that the limits embodied in those provisions are reasonably related to that interest. I cannot conclude from the Commonwealth's brief that even the first prong of the *Turner* test is met in this case. Absent a showing that the provisions in question satisfy *Turner*, the government's motion to dismiss the claims challenging the provisions must be denied.

C. Access to the Courts

Plaintiffs allege that numerous defendants have interfered with their constitutionally guaranteed access to the courts in violation of their First Amendment right to petition the government for redress of grievances. Wheeler alleges that SCIG officials wrongfully delayed mailing his legal mail to courts, including the Third Circuit Court of Appeals and the

[5]Plaintiffs cite *Pepperling v. Risley*, 739 F.2d 443 (9th Cir. 1984), which affirmed the Ninth Circuit's prior holding in *Pepperling v. Crist*, 678 F.2d 787, 790 (9th Cir. 1982), that a prison rule completely banning nude photographs of wives and girlfriends was too restrictive to satisfy the requirements of the First Amendment. *Pepperling* is not precedential in this circuit, however. And its continuing vitality in the Ninth Circuit is questionable in light of the more recently decided *Unger v. United States*, 1997 U.S. App. LEXIS 5330 (9th Cir. 1997) (holding that a prison's outright ban on personal nude photographs satisfied *Turner*).

Prothonotary of Schuylkill County. SAC at 17, 19. He alleges that the prison's delay in mailing materials to the Third Circuit caused him to miss a filing deadline by at least six days. *Id.* at 19. Savage alleges that his copy of the complaint in this case was confiscated and never returned to him. *Id.* at 38. He also alleges that he was denied access to the law library at times when he could meet with his co-plaintiffs to discuss prosecution of this suit. *Id.* at 42. In addition, Savage alleges that prison officials refused to process multiple grievances alleging constitutional violations, in order to prevent him from exhausting administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), and, thereby, to prevent him from gaining access to the federal courts. *Id.* at 45, 54, 57. Fontroy alleges that his legal materials were confiscated and his law books and legal mail were destroyed during a cell search. *Id.* at 78. Pavlichko similarly alleges that his legal pleadings and materials were confiscated during a cell search. *Id.* at 68.

In addition to these specific allegations, plaintiffs make general allegations that the legal resources provided at SCIG are constitutionally inadequate. SAC at 117. They also allege generally that the grievance and appeals process is manipulated by prison officials to deny them access to the courts by preventing them from exhausting their constitutional claims administratively.[6]

"It is well settled that prisoners have a constitutional right to access to the courts, which requires access to 'adequate law libraries or adequate assistance from persons trained in the law' for filing challenges to criminal sentences, both direct and collateral, and civil rights actions."

[6]The Commonwealth, in its motion to dismiss, treats plaintiffs' claim relating to the grievance and appeals process as a procedural due process claim; however, as plaintiffs make clear in their reply brief (and as they stated in the Second Amended Complaint), they attempt to state a claim for denial of access to courts and the right to petition the government. *See* SAC at 86; Reply Brief at ¶ 69.

Allah, 229 F.3d at 224 (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)). When an inmate shows that an actionable claim challenging his sentence or his conditions of confinement has been lost or rejected, or that the presentation of such a claim is currently being prevented, because the capability of filing suit has not been provided, he establishes actual injury sufficient to state a claim for denial of his constitutional right to access to courts. *Lewis v. Casey*, 518 U.S. 343, 356 (1996).

In its brief, the Commonwealth argues that plaintiffs' claims relating to access to the courts are insufficient as a matter of law, because plaintiffs have not alleged the loss or rejection of a non-frivolous legal claim. With respect to the grievance and appeals process specifically, the Commonwealth argues that plaintiffs have no constitutional entitlement to a grievance procedure or to have the claims raised in their grievances investigated.[7]

The allegations plaintiffs make concerning deliberate obstruction of their legal efforts by prison officials are serious, and, if true, troubling. However, under *Lewis*, it takes more than proof of obstruction to make out a constitutional claim that access to the courts has been denied. With the possible exception of Wheeler's allegation that a deliberate delay in sending his legal mail resulted in his missing specific filing deadlines, none of the plaintiffs has alleged that he suffered any actual injury in the form of loss or rejection of a claim, or prevention of the presentation of a claim, resulting from any defendant's alleged obstruction of his efforts to pursue legal relief.[8] Nor do plaintiffs allege that the putative dearth of legal resources available to

[7]The court notes that the Commonwealth provides little elaboration of this argument and cites no precedential authority to support it.

[8]It is unclear from the face of the complaint whether Wheeler is suggesting that he suffered any actual prejudice as a result of the mailing delays he alleges.

them at SCIG has meaningfully compromised their capability of filing suit.[9]

As for the question of exhaustion, while it is true that the PLRA requires inmates to exhaust claims administratively before bringing a § 1983 claim in federal court, lack of exhaustion is not a jurisdictional bar; rather, it is an affirmative defense which must be asserted by the defendant. *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002). The Commonwealth, in its motion, does not attempt to obtain dismissal by arguing that plaintiffs have failed to exhaust any claim.[10] Even if plaintiffs can prove their grave allegation that officials at SCIG have manipulated the grievance process to try to keep them out of federal court, they have not alleged that such manipulation resulted in any actual prejudice with respect to any specific claim(s).

Absent allegation of actual injury of the type required by *Lewis*, plaintiffs cannot state a claim that their access to the courts has been unconstitutionally denied. The Commonwealth's motion to dismiss plaintiffs' claims relating to access to the courts is therefore granted as to all claims and plaintiffs except as to Wheeler's claim based on the alleged delay in mailing materials to the Third Circuit or the Prothonotary of Schuylkill County.

II. Eighth Amendment Claims

A. General Environmental Conditions

Plaintiffs allege a litany of Eighth Amendment violations relating to their living conditions at SCIG. The Second Amended Complaint contains an extensive list of complaints,

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[9]On the contrary, the length of the docket in this case and other cases brought by plaintiffs provides ample evidence that plaintiffs' have continually and energetically demonstrated their capability of accessing the courts.

[10]The Third Circuit has suggested in dicta that defendants may raise failure to exhaust as the basis for a motion to dismiss in cases where the defense would present an insuperable obstacle to the plaintiff's recovery. *Ray*, 285 F.3d at 295 n.8.

including overcrowding; inadequate sanitation and sewage disposal; unsanitary food preparation and service; lack of healthy diet; exposure to environmental asbestos, lead-based paints, and water-borne toxins; and vermin infestation. Plaintiffs claim that their living conditions at SCIG constitute cruel and unusual punishment.[11] SAC at 108, 115-116.

The Commonwealth argues for dismissal of plaintiffs' claims involving general environmental conditions at SCIG on the ground that the claims are both frivolous and barred by the doctrine of *res judicata*The Commonwealth maintains that plaintiffs' claims challenging the constitutionality of the conditions of confinement at SCIG are nothing more than a rote duplication of claims previously settled in *Austin v. Pennsylvania Deptartment of Corrections*, 876 F. Supp. 1437 (E.D. Pa. 1995).[12] Plaintiffs reject the Commonwealth's position that *Austin* settled the claims raised in their complaint.

The class certified in *Austin* included "all persons who are now or who will in the future be confined by the [DOC] in a facility other than [SCI Muncy or SCI Pittsburgh]." *Id.* at 1444. The four plaintiffs in this case, all of whom are incarcerated at SCIG, are therefore within the *Austin* class. Although the Commonwealth may be correct in its assertion that plaintiffs are attempting to relitigate claims raised in *Austin*, it is mistaken insofar as it believes that the

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[11]In its brief, the Commonwealth refers to claims relating to family picnics and lack of Saturday mail service. Plaintiffs also refer to these claims in their response. Both parties, however, appear to be referring to an earlier version of the complaint. Because these claims do not appear in the Second Amended Complaint, which superseded all prior versions of the complaint, the court assumes that plaintiffs have dropped them.

[12]*Austin* was a sweeping and extensively litigated class action filed a decade ago on behalf of inmates in thirteen Pennsylvania prisons, including SCIG. The suit challenged allegedly inhumane and unconstitutional conditions of confinement ranging from overcrowding and inadequate medical and legal services to substandard environmental, health, and fire-safety conditions. *See id.* at 1444-1445.

settlement in *Austin* has any preclusive effect on this litigation.

The court in *Austin* took the unprecedented step of accepting a settlement that provided for a dismissal of the suit without prejudice to the rights of class members to seek monetary or injunctive relief in a subsequent suit. *Id.* at 1455. The court explained that, pursuant to the settlement agreement, "any class member will be able to file an individual claim or, if appropriate, a representative claim on the issues covered by the settlement" after dismissal. *Id.* at 1456. Because class counsel in *Austin* negotiated for and won a dismissal of the class's claims without prejudice, the Commonwealth's argument that plaintiffs' claims relating to general environmental conditions at SCIG are barred by the doctrine of *res judicata* cannot succeed.

If it is true, as the Commonwealth contends, that sections of the Second Amended Complaint in this case are identical to sections of the *Austin* complaint, plaintiffs are cautioned that the filing of claims that are repetitious or that litigants know to be frivolous entitles a district court "to resort to its power of injunction and contempt to protect its process." *Abdul-Akbar v. Watson*, 901 F.2d 329 (3d Cir. 1990) (upholding a district court injunction directing that the inmate litigant not file any claim under § 1983 without leave of the court).

It is not apparent from the face of plaintiffs' complaint that their pursuit of claims already litigated in *Austin* is malicious or frivolous. Nearly ten years have passed since the court accepted the settlement in *Austin*, and, given the immature state of the record in this case, it is impossible to assess to what extent or in what manner conditions at SCIG have changed as a result of the settlement in the prior suit. Should it become apparent as this case progresses that plaintiffs are pursuing Eighth Amendment claims that they know to be non-meritorious, this court will take necessary action to protect the integrity of the legal process.

B. Excessive Heat in Dining Halls

Plaintiffs allege in the Second Amended Complaint that excessive heat and inadequate ventilation in four inmate dining halls at SCIG violate their Eighth Amendment right to be free from cruel and unusual punishment. SAC at 105-107. According to plaintiffs, the dining halls, which were newly opened in 2001, do not have air conditioning or proper ventilation. During the summer months, temperatures in the dining halls exceed one hundred degrees, and the lack of ventilation makes the facilities so unbearable that inmates have simply elected to forego eating rather than be subject to the conditions in the dining halls. Because of the excessive heat, plaintiffs allege, they are effectively being denied two of the three meals they would ordinarily eat in a day. Plaintiffs have filed multiple grievances with SCIG authorities complaining of the problem and have received no redress. They further allege that they have exhausted their administrative remedies with respect to this issue.

"The Eighth Amendment applies to prisoner claims of inadequate cooling and ventilation. Cooling and ventilation are distinct prison conditions, and a prisoner may state an Eighth Amendment claim by alleging a deficiency as to either condition in isolation or both in combination." *Chandler v. Crosby*, 379 F.3d 1278, 1294 (11th Cir. 2004). However, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

In its motion to dismiss, the Commonwealth maintains that, even if the facts alleged by

plaintiffs concerning excessive heat in SCIG's dining halls are true, their claim must fail because they have not alleged, as required by *Farmer*, that the conditions in the dining halls pose a substantial risk of serious harm. Reading the complaint liberally, I conclude that plaintiffs have alleged facts sufficient at least to establish the basis for an inference that they have been subjected to the requisite risk of harm.

Plaintiffs have alleged that they are forced, as a practical matter, to skip as many as two meals a day during the summer months due to the excessive heat in the dining halls. Taking this allegation to be true, as I must for present purposes, the question of whether such deprivation rises to the level of serious harm cannot be answered absent evidence of the duration and severity of the heat. In *Chandler*, *supra*, the case on which the government relies to support its position that plaintiffs have failed to allege facts sufficient to sustain an Eighth Amendment claim, the trial judge based his conclusion on a range of facts in the record, including daily temperature readings taken over the course of the summer months and specific information concerning the design and operation of the prison's ventilation system. *See Chandler*, 379 F.3d at 1297. As it now stands, there is no record in this case that establishes such probative facts.

As the *Chandler* court acknowledged, the bar is very high for prisoners seeking to prove that excessive heat and/or poor ventilation rise to the level of an Eighth Amendment violation. Absent further development of the factual record on this issue, however, it is impossible to say whether plaintiffs in this case will be able to adduce sufficient proof to meet their heavy burden. The government's motion to dismiss plaintiffs' claim relating to excessive heat and poor ventilation in the SCIG dining halls is therefore denied.

C. Medical Issues

1. General Medical Issues

In the sections of the Second Amended Complaint entitled "Health and Psychiatric Issues" and "HIV/AIDS Health Issues," defendants complain that the DOC fails to deliver adequate healthcare services to Pennsylvania inmates due to such factors as chronic staff shortages and inadequate facilities. SAC at 109-114. The Commonwealth argues that the claims asserted in these sections of the complaint should be dismissed because they were already litigated in *Austin*, *see supra*, and because plaintiffs fail to allege any specific constitutional wrongdoing on the part of any DOC employee.

"In order to succeed in an action claiming inadequate medical treatment, a prisoner must show more than negligence; he must show 'deliberate indifference' to a serious medical need."*Durmer v. O'Carroll*, 991 F.2d 64, 67 (3d Cir. 1993). The "deliberate indifference to serious medical needs" standard can be met in a number of circumstances: (1) when a physician intentionally inflicts pain on a prisoner; (2) when prison authorities deny reasonable requests for medical treatment, and such denial exposes the inmate to undue suffering; (3) when knowledge of the need for medical care is accompanied by the intentional refusal to provide that care. *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) (internal quotations omitted).

While many of plaintiffs' allegations in these sections of the complaint undoubtedly touch upon serious medical needs, plaintiffs do not allege that any of the deficiencies of which they complain results from deliberate indifference to inmate health or safety on the part of any DOC defendant. Rather, plaintiffs acknowledge that "[a]ll these deficiencies in medical and mental health care reflect inadequate funding for medical staff, support staff and equipment." SAC at 111. Plaintiffs make the same acknowledgment relating to the provision of HIV/AIDS-

related services: "These deficiencies arise out of the same systemic failures that prevent the delivery of adequate general medical care." *Id.* at 113. Allegations of inadequate funding do not equate with allegations of deliberate indifference. Because plaintiffs have not alleged any deliberate indifference to their serious medical needs on the part of any named defendant in this case, their generalized claims concerning inadequate healthcare at SCIG must be dismissed for failure to state a claim upon which relief can be granted.

2. Denial of Surgery

In the section of the Second Amended Complaint entitled "Medical Denial Due to Cost," Wheeler claims that his Eighth Amendment right to be free from cruel and unusual punishment was violated when prison officials at SCIG declined to authorize surgery to remove a lump on his left arm. SAC at 93-94. According to Wheeler, the lump was first discovered when he was incarcerated at SCI Frackville ("SCIF"), and it was initially diagnosed as a carbon deposit. The diagnosis was later changed to tendinitis. When Wheeler was transferred from SCIF to SCIG, he again sought treatment for the lump, which was diagnosed first as a cyst and later as a tumor. He alleges that no treatment was provided subsequent to any diagnosis, though he was, at one time, on the waiting list at SCIG for minor surgery to have the lump removed. Wheeler alleges that, after several months, he was taken off SCIG's waiting list for surgery when an unidentified medical consultant disapproved the surgery. The denial of surgery, Wheeler claims, was in violation of the DOC's duty of care to inmates and was based on economic rather than medical considerations.

In its motion to dismiss, the Commonwealth argues, citing *Durmer*, 991 F.2d at 64, that "nothing under the Eighth Amendment requires prison officials who are laymen at medicine to

override, question, or second guess decisions by medical personnel." The Commonwealth argues that Wheeler's claim must fail as a matter of law, because nothing in the complaint "suggests that [he was] ever exposed to any substantial risk of serious harm about which defendants knew." Wheeler counters that the prison's failure to treat the lump on his arm was the result of deliberate indifference by prison officials, that the lump may be cancerous, and that abnormal blood test results he recently received could be related to the failure to remove the lump.

As stated above in Section II. C. 1., "[i]n order to succeed in an action claiming inadequate medical treatment, a prisoner must show more than negligence; he must show 'deliberate indifference' to a serious medical need." *Durmer*, 991 F.2d at 67. Wheeler has alleged deliberate indifference in that he claims he repeatedly sought medical treatment at SCIG for the lump on his arm but never received any treatment, even though the lump had been diagnosed on at least one occasion as a tumor. As to whether his medical need is sufficiently serious that a deliberate failure to treat him rises to the level of a constitutional violation, the record is not adequately developed for the court to make a determination.

Given Wheeler's allegations, which must be accepted as true at this juncture, that the lump has not been definitively diagnosed and that it has most recently been diagnosed as a tumor, which presumably could be cancerous, I cannot now conclude as a matter of law that Wheeler will be unable to prove that he has a serious medical need to which prison officials have shown deliberate indifference by failing to treat him. The government's motion to dismiss Wheeler's Eighth Amendment claim relating to the lump on his arm must therefore be denied.

3. Denial of Electric Shaver

Wheeler alleges an Eighth Amendment violation based on SCIG's policy banning the

possession of electric shavers by inmates. SAC at 95- 97. Wheeler alleges the following facts: He suffers from a dermatologic condition common to African American men and other men with curly facial hair. The condition causes his face and neck to become badly irritated and infected when he shaves with a standard disposable razor. When Wheeler was at SCIF, a physician there recommended that he use an electric shaver, which he was allowed to do until he was transferred to SCIG. When he arrived at SCIG, Wheeler was required to give up his electric shaver, pursuant to a newly implemented policy, and to shave instead with a disposable razor. This caused him to develop facial infections, which were treated by a dermatologist at SCIG using a variety of methods, none of which succeeded to Wheeler's satisfaction. Wheeler filed grievances in an attempt to get authorization to use an electric shaver or to go to the barbershop once a week to have his face shaved. He was denied relief of the kind he requested.

The Commonwealth argues that "it diminishes the significance of the Eighth Amendment to suggest that a ban on the possession of an electric razor or beard trimmer amounts to cruel and unusual punishment." Wheeler argues that his dermatologic condition is a serious medical condition, and that, by denying him the use of an electric shaver yet requiring him to keep his facial hair trimmed, SCIG officials acted with deliberate indifference to his serious medical needs in violation of the standard articulated in *Farmer v. Brennan*, 511 U.S 825 (1994).[13]

The Third Circuit has held that mere disagreement as to the proper medical treatment for an inmate's medical condition is insufficient to establish a constitutional violation. *Spruill*, 372

[13]Wheeler cannot persuasively argue that he is caught in a Catch-22 here. He does not allege that he is required by prison regulations to remain entirely free of facial hair; he alleges only that he is required to keep his facial hair trimmed. The prison has not, therefore, denied him the only hygienic means by which he may comply with regulations.

F.3d at 235. Wheeler does not allege that SCIG officials denied him treatment for his facial infections. On the contrary, he avers that he was seen by a dermatologist, who "prescribed various acne creams, antibiotics, and other drugs to try and cure" his condition. SAC at 95.

The Eighth Amendment does not entitle an inmate to his preferred course of treatment for a medical condition, or even to the continuation of a specific course of treatment that was previously prescribed by a treating physician at another facility. Wheeler may not like the therapeutic approach taken by the dermatologist who treated him at SCIG, but his disagreement with prison medical personnel over how best to ameliorate his shaving-induced skin condition is not a basis for constitutional relief. The Commonwealth's motion to dismiss Wheeler's claim relating to his possession and use of an electric shaver is therefore granted.

III. Fourteenth Amendment Due Process Claims

A. Taking and Destruction of Personal Property

Plaintiffs allege in various portions of the Second Amended Complaint that they have been subject to the destruction or unwarranted confiscation of various items of personal property during cell searches by DOC defendants. Plaintiffs claim that their right to procedural due process with respect to the taking of their property has thereby been violated.

Wheeler alleges that defendants Clayton and Hardnett confiscated twenty-nine packs of cigarettes from his cell, even though prison regulations allow inmates to have up to thirty packs at a time. SAC at 12. Wheeler filed a grievance to complain of the confiscation, and the grievance was denied. *Id.* Wheeler appealed to defendant Vaughn, who denied his appeal. *Id.* at 13. Wheeler then appealed to the Secretary's Office of Inmate Grievances and Appeals

("SOIGA"), which also denied the appeal.[14] *Id.* Wheeler alleges that decisions in response to both of his appeals were impermissibly delayed beyond the maximum time set forth DC-ADM 804, the regulation that governs the inmate grievance process. *Id.* at 12-13.

Wheeler also alleges that guards "trashed" his cell on December 18, 2002 and broke both his radio and his TV antenna. SAC at 15. He filed a grievance, which was evaluated by defendant Conrad and decided in Wheeler's favor. *Id.* Conrad recommended that Wheeler be compensated for the cost of repairing the broken items. *Id.* This recommendation was approved by defendant Hatcher but ultimately disapproved, upon review, by defendant Vaughn. *Id.* Wheeler appealed the denial to SOIGA, and the denial was upheld. *Id.*

Savage alleges that, after a cell search by SCIG guards, his wristwatch was missing, and his typewriter was broken. SAC at 26. He alleges that he "made demand for reimbursement" for the loss of his watch and the damage to his typewriter; however, he does not allege that he pursued the complaint through the prison's formal grievance procedure. *Id.* Savage also claims that a copy of the complaint in this case was confiscated from his cell, but he was never given a "Confiscated Item Receipt," which is required by prison regulations. *Id.* at 38. Again, he does not allege that he filed a formal grievance to complain of the confiscation or the failure to provide a receipt.[15]

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[14]The DOC grievance process provides for three stages of review: initial review; appeal to the facility manager; and appeal to the Secretary's Office of Inmate Grievance and Appeals. *See* DC-ADM 804 Part VI; *Spruill*, 372 F.3d at 232 (discussing the grievance process in the context of the PLRA's exhaustion requirement).

[15]Plaintiffs make a blanket claim in the section of the Second Amended Complaint entitled "Exhaustion of Administrative Remedies" that they have exhausted or unsuccessfully attempted to exhaust "[a]ll claims set forth in this complaint." SAC at 118. For purposes of the 12(b)(6) motion, this claim must be accepted as true.

Pavlichko claims that SCIG guards searched his cell and confiscated all his legal materials. SAC at 68. He does not allege that he filed a grievance concerning the incident, nor does he state whether the materials were subsequently returned. Fontroy, too, alleges that all his legal materials were confiscated. *Id.* at 78. He further alleges that the materials remain in the possession of SCIG officials. *Id.* It appears from the face of the complaint that Fontroy was in possession of legal materials exceeding limits allowed by DOC policy. He makes reference to grievances he filed requesting "retention of excess Core Legal materials." *Id.* He does not say whether those grievances were denied or whether he appealed any denial he may have received.

The Commonwealth argues, citing *Hudson v. Palmer*, 468 U.S. 517 (1984), that the destruction of an inmate's property is not prohibited by the Fourth Amendment, where, as here, there is an available post-deprivation remedy in the form of a grievance procedure. Therefore, "to the extent plaintiffs complain of the unreasonable searches of their cells or the confiscation or destruction of their property, such claims should be dismissed." Commonwealth's Memorandum of Law (Doc. #204) at 18.

Plaintiffs concede that the Fourth Amendment prohibition against unreasonable searches and seizures does not apply to an inmate's cell. Plaintiffs' Reply Memorandum (Doc. #190) at ¶ 93. They argue that they nevertheless have a Fourteenth Amendment due process right to notice and a hearing concerning confiscation of property or damage to property caused during cell searches. *Id.* at ¶¶ 93-95.

In *Hudson, supra*, the Supreme Court held that intentional deprivations of inmate property do not violate the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. *Hudson*, 468 U.S.

at 533. Here, a post-deprivation remedy in the form of a formal grievance procedure is available to plaintiffs. The DOC grievance system has been held by courts in this circuit to provide an adequate post-deprivation remedy to inmates, in satisfaction of the Due Process Clause. *See McEachin v. Beard*, 319 F. Supp. 2d 510, 514-515 (E.D. Pa. 2004) (citing *Tillman v. Lebanon County Correctional Facility*, 221 F.3d 410, 422 (3d Cir. 2000); *Allah v. Al-Hafeez*, 208 F. Supp. 2d 520, 537 (E.D. Pa. 2002)).

Of the four plaintiffs, only Wheeler, who alleges that two appeals of the denial of his grievance relating to the confiscation of his cigarettes were decided untimely, makes any factually specific allegation that DOC employees failed to adhere to the requirements of the DOC's internal grievance process with respect to handling formal complaints pertaining to damaged or confiscated inmate property. The failure he alleges, however, amounts only to a temporary delay which resulted in no prejudice to him. While temporarily delayed adjudications may be relevant to Wheeler's retaliation claim, they do not, standing alone, constitute a meaningful or actionable denial of post-deprivation due process.

To the extent that plaintiffs have grieved their alleged property deprivations in accordance with the DOC's established process and have successfully exhausted their remedies thereunder, they have availed themselves of the post-deprivation remedy to which they are entitled by the Fourteenth Amendment. Plaintiffs would do well to assimilate the idea that an adverse response to a grievance does not constitute a federal constitutional violation. *McEachin*, 319 F. Supp. 2d at 515.

Because plaintiffs have been afforded an adequate post-deprivation remedy in the form of the DOC's grievance process, and because they have not alleged that they have been

meaningfully denied due process with respect to any of their property-related grievances, the Commonwealth's motion to dismiss plaintiffs' property-related due process claims is granted.

B. Misappropriation of Inmate General Welfare Fund Monies

Plaintiffs allege that DOC Defendants Beard, Vaughn, DiGuglielmo, Croll, Spencer, and Wolfe misappropriated funds from the Inmate General Welfare Fund ("IGWF") by using money from the fund for their own personal use, instead of for the proper uses documented in the IGWF Monthly Accounting Report. Plaintiffs maintain that the IGWF was "created to help pay for some of the cost involved in providing programs and necessities to inmates during their incarceration." SAC at 104. Plaintiffs infer, based on their own experience of the allegedly deficient programs and facilities at SCIG, that defendants could not possibly be using the money for the purposes itemized in the monthly reports. *Id.*

The Commonwealth, which interprets plaintiffs' claim as one arising under state law, argues that any claim relating to the misappropriation of monies in the IGWF is barred by the doctrine of state sovereign immunity. Plaintiffs counter that they intended to state a constitutional claim; they argue that they have a protected property interest in the IGWF and in how monies in the fund are collected, distributed, and spent. Plaintiffs' Reply Brief at ¶ 100.

Plaintiffs correctly assert that they have a property interest in funds held in their inmate accounts. Thus, they are entitled to due process with respect to any deprivation of that money. *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir. 1997) (internal citations omitted). However, whether the IGWF is an inmate account of the kind contemplated in *Reynolds*–which seems doubtful–or a trust account of the type ostensibly involved in *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247 (3d Cir. 1969) (holding that abstention was proper

because New Jersey had an overriding interest in seeking to develop its own policy where there had been no adjudication by the state courts as to the legal attributes of the fund or what status the inmates had in relation to it)–which seems more likely–is unclear at this stage in the proceedings. Given the uncertainty concerning both the status of the fund under state law and the status of plaintiffs in relation to the fund, it would be premature to dismiss plaintiffs' misappropriation claim at this time.

IV. Sovereign Immunity

The Commonwealth argues that plaintiffs' claims against the DOC, SCIG, the SCIG Medical Department, the SCIG Mental Health Department, and the SCIG CERT Team are barred by the Eleventh Amendment. Moreover, the Commonwealth asserts, these entities cannot be sued under § 1983 because they are not "persons" within the meaning of the statute.

The United States Supreme Court has held that suit against a state and its Board of Corrections is barred by the Eleventh Amendment, unless the state has consented to the filing of such a suit. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). This immunity extends to all departments or agencies "having no existence apart from the state." *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981) (citing *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977)). The Commonwealth of Pennyslvania has not consented to suit. On the contrary, Pennsylvania, by statute, has expressly withheld its consent to be sued. *Id.* (citing 42 Pa.C.S.A. § 8521(b)[16]). Because the DOC, SCIG, the SCIG Medical Department, the SCIG Mental Health

[16]§ 8521(b) provides the following: "Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." *Laskaris*, 661 F.2d at 25.

Department, and the SCIG CERT Team are entities that have no existence apart from the state, and because the Commonwealth has not waived its sovereign immunity, the Eleventh Amendment requires that these entities be dismissed as parties to this suit.

The Commonwealth is also correct in its argument that these entities must be dismissed from the suit because state agencies are not "persons" within the meaning of § 1983. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 70 (1989) (holding that states and governmental entities that are considered "arms of the State" for Eleventh Amendment purposes are not "persons" under § 1983). Because the DOC, SCIG, the SCIG Medical Department, the SCIG Mental Health Department, and the SCIG CERT Team fall logically under the rubric of governmental entities that are "arms of the state," they may not be sued under § 1983. The Commonwealth's motion to dismiss the DOC, SCIG, the SCIG Medical Department, the SCIG Mental Health Department, and the SCIG CERT Team as defendants in this suit is therefore granted.

V. Personal Involvement Requirement of § 1983

The Commonwealth argues that plaintiffs' § 1983 claims against defendants Arroyo, Beard, Burke, Canino, Conrad, Croll, DiGuglielmo, Feilds, Geist, Grassmeyer, Hardnett, Hatcher, Horn, Hosband, James, Jones, Klem, Knauer, Kyler, Martin, Maue, McVey, Mooney, Moyer, Murray, O'Hara, Rosso, Smith, Spencer, Stachelek, Ulisney, Vaughn, and Wolfe must be dismissed because plaintiffs do not allege personal wrongdoing on the part of any of these defendants, as required by § 1983. To state a claim under § 1983, a plaintiff must show that the defendant state official(s) participated in constitutional wrongdoing or had personal knowledge of and acquiesced in the alleged wrongdoing. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

A thorough review of the Second Amended Complaint–and a very liberal construction thereof–reveals that allegations of either direct constitutional wrongdoing or knowledge of and acquiescence in such wrongdoing are made against all of the above-named defendants, excepting Conrad, Hardnett, and Rosso. Allegations against some defendants are more factually specific than those against others, and many of the allegations appear to be rather tenuous, but it is not for the court as this point to make judgments about the credibility of plaintiffs' allegations.

With respect to Conrad, Wheeler alleges only that Conrad recommended that he (Wheeler) be compensated for damage to his personal belongings that allegedly occurred during an improper cell search. SAC at 15. Pavlichko alleges that Conrad authorized him to visit Housing Unit D so that Pavlichko could meet with his co-plaintiffs. *Id.* at 74. Fontroy alleges that Conrad telephoned an outside vendor on Fontroy's behalf to check the status of his eyeglass repair. *Id.* at 82. These are not allegations of wrongdoing; on the contrary, they are uniformly allegations of helpfulness. As there are no allegations of wrongdoing against Conrad in the Second Amended Complaint, he is not a proper defendant in this suit.

With respect to Hardnett, Wheeler alleges that Hardnett participated in the cell search that resulted in the confiscation of his (Wheeler's) cigarettes. SAC at 12. Wheeler acknowledges, however, that the search and confiscation occurred before he filed the lawsuit that is the purported basis for the retaliatory conduct alleged this case. *Id.* It is logically impossible for conduct occurring before an action that allegedly triggered a retaliatory response to be conduct in retaliation for that action. Furthermore, because Wheeler's due process claim relating to the taking of his cigarettes is insufficient as a matter of law, *see supra*, and because the cigarette confiscation is the only allegedly illegal act of which Hardnett is accused in the Second Amended

Complaint, plaintiffs' § 1983 claim against Hardnett must fail.

With respect to Rosso, the Second Amended Complaint contains no allegations of constitutional wrongdoing against him. He is named only in connection with plaintiffs' antitrust and common law fraud claims, which have been dismissed with prejudice as to all DOC Defendants in a separate opinion. In light of these facts, Rosso must be dismissed as a party to this suit.

Because the Second Amended Complaint fails to allege personal involvement in constitutional wrongdoing on the part Conrad, Hardnett, or Rosso, and because such personal involvement is a necessary element of a § 1983 claim, plaintiffs fail to state any valid claims against Conrad, Hardnett, or Rosso. Accordingly, the Commonwealth's motion to dismiss defendants as parties for lack of personal involvement in constitutional wrongdoing is granted as to those three parties but denied as to the remaining individual DOC defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARON C. WHEELER, et. al., Plaintiffs	:	CIVIL ACTION
v.	:	
	:	NO. 03-4826
JEFFREY BEARD, et. al., Defendants	:	

Order

AND NOW, this _____ day of August, 2005, upon careful consideration of the Commonwealth defendants' motions to dismiss the Second Amended Complaint (Doc. #185, #204, and #218) and plaintiffs' briefs in opposition to the motions (Doc. #190, #199), it is hereby ORDERED that the motions are

(1) DENIED with respect to plaintiffs' First Amendment retaliation claims;

(2) DENIED with respect to plaintiffs' First Amendment challenge to prison mail regulation DC-ADM 803;

(3) GRANTED with respect to plaintiffs' First Amendment access to courts claims, EXCEPT with respect to Wheeler's claim relating to alleged delays in mailing legal materials to the U.S. Court of Appeals for the Third Circuit and the Prothonotary of Schuylkill County;

(4) DENIED as to plaintiffs' Eighth Amendment claims relating to general environmental conditions and excessive heat in the dining halls at SCIG;

(5) GRANTED as to plaintiffs' Eighth Amendment claims relating to the provision of medical services at SCIG, EXCEPT with respect to Wheeler's claim relating to the alleged denial of surgery to remove a lump on his arm;

(6) GRANTED as to plaintiffs' Eighth Amendment claim relating to the denial of an electric shaver to Wheeler;

(7) GRANTED as to plaintiffs' Fourteenth Amendment procedural due process claims relating to the adequacy of prison grievance procedures to address alleged deprivations of their personal property;

(8) DENIED as to plaintiffs' Fourteenth Amendment due process claim relating to the alleged misappropriation of monies from the Inmate General Welfare Fund;

(9) GRANTED as to all claims against institutional defendants the DOC, SCIG, the SCIG Medical Department, the SCIG Mental Health Department, and the SCIG CERT Team, which are hereby DISMISSED as defendants to this action; and

(10) GRANTED as to all claims against individual defendants Conrad, Hardnett, and Rosso, who are hereby DISMISSED as defendants to this action.

It is further ORDERED that

(1) defendants shall file an answer within twenty (20) days; and

(2) any motion to sever individual claims or parties shall be filed within thirty (30) days.

_____

William H. Yohn, Jr., Judge